No. 85-495

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANSONIA SCHOOL BOARD, *ET AL*,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

**On Writ Of Certiorari From
The United States Court Of Appeals
Second Circuit**

MOTION OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PHILBROOK

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PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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MOTION OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The General Conference of Seventh-day Adventists respectfully moves this Court for leave to file the accompanying brief as *amicus curiae*. Counsel of Record for Petitioner has consented to the filing of such a brief. Counsel for the Respondent School Board, however, declined to do so.

INTEREST OF APPLICANT

The Seventh-day Adventist Church is a worldwide religious denomination whose four and a half million members follow the Biblical command that the Sabbath, the seventh day of the week, be set aside from secular work and other wordly endeavors.

Because of their Sabbatarian beliefs and practices, Seventh-day Adventists often encounter scheduling difficulties in the workplace. In one four-year period, the Church's Department of Public Affairs and Religious Liberty recorded more than 800 employment problems involving Sabbath observance in the United States, where some 600,000 Adventists reside. *Hearings Before the United States Equal Employment Opportunity Commission on Religious Accommodation* 30 (1980). Following this Court's decision in *Trans World Airlines, Inc.*, v. *Hardison*, 432 U.S. 63 (1977), the number of such problems "has ballooned." *Hearings* at 30.

Since *Hardison*, the vitality of the religious accommodation provisions of Title VII has been uncertain. Some commentators have theorized that these provisions are a violation of the First Amendment's Establishment Clause.[1] Employers have often relied upon the *de minimus* standard articulated in *Hardison* as an excuse for their refusal to accommodate employees' religious beliefs and practices thus making it more difficult for employees to negotiate reasonable religious accommodations. Indeed, one Circuit Court determined that employers are under virtually no obligation to attempt any accommodation at all. *Turpen* v. *Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022 (5th Cir. 1984).

Understandably, the Seventh-day Adventist Church and its members have a significant interest in urging this Court to: (1) affirm the constitutionality of the religious

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[1] *E.g.*, Garvey, *Freedom and Equality in the Religion Clauses*, 1981 Sup. Ct. Rev. 193, (1981); Eades, *Title VII of the Civil Rights Act of 1964—An Unconstitutional Attempt to Establish Religion*, 5 U. Dayton L.R. 59 (1980); Note, *Is Title VII's Reasonable Accommodations Requirement a Law "Respecting an Establishment of Religion"?*, 51 N.Dame Law 482 (1976).

accommodation provision of Title VII; and (2) carefully define the appropriate time at which the defense of undue hardship can be raised. Absent such an opinion the protections provided in Title VII for religious minorities are without meaning.

Its *Amicus Curiae* brief would argue three points: (1) an employer must attempt an accommodation before it is entitled to raise the defense of undue hardship; (2) the Free Exercise Clause requires the state, as employer, to accommodate the religious needs of its employees, apart from Title VII of the Civil Rights Act of 1964; and (3) that the religion clauses of the First Amendment be read together as protecting religious liberty; and thus, the religious accommodation provision of Title VII is a constitutionally permissible protection of employees' religious freedom.

The Adventist Church is deeply concerned with the consequences that the Court's decision may have on religious accommodation in employment. It will certainly affect individual employees throughout the country, and will either impress employers with the seriousness of their legal duty, or alternatively, may be used as an excuse to avoid any responsibility under Title VII. The Court's decision will also affect the religious accommodation provisions of other federal laws. For example, the Court's decision could bring into question the constitutionality of such diverse religious exemption or accommodation provisions as the exemption for ministers in the Selective Service Act, 40 U.S.C.A. § 456(g); the exemption for employees who have religious objections to paying dues and fees to labor organizations, 29 U.S.C.A. § 169; and the exemption for self-employed individuals who have religious objections to paying Social Security taxes, 26 U.S.C.A. § 1402(g).

Because of the interest in preserving the First Amendment rights of its members and others who because of sincerely held religious convictions are unable to work on their holy days, the Seventh-day Adventist Church requests that its motion for leave to file an *amicus curiae* brief in support of Petitioner Philbrook be granted.

Respectfully submitted,

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BRIEF OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The interest of the Seventh-day Adventist Church as *amicus curiae* has been detailed in the Church's Motion for Leave to File *Amicus Curiae* Brief, which is attached to this brief and incorporated here by reference.

SUMMARY OF ARGUMENT

The religious accommodation provision of Title VII of the Civil Rights Act of 1964 requires employers to take active steps to accommodate the religious practices of

their employees. In the absence of such active attempts, the employer is guilty of discrimination and is not entitled to raise the defense of undue hardship. Since the school steadfastly refused to even attempt to work out an accommodation with Respondent Philbrook, the school board cannot rely upon the defense of undue hardship.

Apart from the requirements of Title VII, the Free Exercise Clause also protects state employees from religious discrimination in employment. Under a balancing of interests test, the school board cannot show that its interest in providing education would be undermined by paying Philbrook for his religious leave. Furthermore, since other employees are entitled to paid leave for secular purposes, to fail to pay Philbrook for his valid religious leave constitutes both religious discrimination and a denial of equal protection.

Finally, the *de minimus* language used by the Court in *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977), has been misunderstood as establishing a new standard of accommodation that, in effect, does not really require the employer to accommodate the religious practices of its employees. Since § 701(j) is fully consistent with both Religion Clauses of the First Amendment, the reasonable accommodation standard needs to be reaffirmed by the Court so that employers will understand that they do, indeed, have a duty to accommodate.

ARGUMENT

I. THE EMPLOYER MUST FIRST SHOW AN ACTUAL ATTEMPT AT A REASONABLE ACCOMMODATION BEFORE IT CAN RAISE THE DEFENSE OF UNDUE HARDSHIP.

If left to themselves, employers are frequently unwilling to be bothered with the religious needs of individual employees. Thus, § 701(j) of Title VII was enacted to require employers to actively accommodate the religious

practices of its employees. If the goal of Title VII in eliminating religious discrimination is to be achieved, employers need a clear message of their obligations under this law. Absent affirmative efforts at accommodation, employers must not be permitted to raise the defense of undue hardship on the operation of their business.

Several courts have interpreted § 701(j) as requiring just such affirmative efforts to accommodate before an employer can raise the defense of undue hardship. Thus, "an employer cannot sustain its burden of showing undue hardship without first showing that it made an accommodation as an attempted remedy." *Claybaugh* v. *Pacific Northwest Bell Telephone Co.*, 355 F.Supp. 1, 6 (D.Or.1973). This standard was adopted by the Ninth Circuit Court of Appeals in a pair of cases involving religious objection to the payment of union dues. *Anderson* v. *General Dynamics*, 589 F.2d 397 (9th Cir. 1978); *Burns* v. *Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978). In both cases, the union refused to accept as a religious accommodation payment by the employees of an amount equivalent to the union dues to a charity. In *Burns*, the court said: "the employer is required to take some steps in negotiating with the employee to reach a reasonable accommodation to the particular religious beliefs at issue." *Id.* at 406. Thus, the employer was required to make "more than a negligible effort to accommodate the employee" and only after such attempts prove "inadequate" may the employer plead undue hardship. *Id.*

In *Anderson*, the court said: "[t]he burden was upon the [company], not Anderson, *to undertake initial steps toward accommodation*. They cannot excuse their failure to accommodate by pointing to deficiencies, if any there were, in Anderson's suggested accommodation." *Id.* at 401 (emphasis added). Further, once the plaintiff establishes a prima facie case, the burden then shifts to the

employer "to prove that they made good faith efforts to accommodate" the employee's religious beliefs. *Id.* The court's refusal to permit the company to raise the undue hardship defense was based in part upon its "skepticism concerning 'hypothetical hardships' based on assumptions about accommodations which have never been put into practice." *Id.*, (citation omitted).

The Sixth Circuit adopted a similar standard in *McDaniel* v. *Essex*, 571 F.2d 338 (6th Cir. 1978). The court stated that "none of our opinions may be read as excusing an employer from making any effort to accommodate the religious beliefs of an employee." *Id.* at 342. Thus, the court placed the burden on the employer "to make an effort at accommodation and, if unsuccessful, to demonstrate that they were unable to reasonably accommodate the plaintiff's religious beliefs without undue hardship." *Id.* On remand in *McDaniel*, the District Court declared:

> Nevertheless, it is the opinion of this court that proof of an effort by the defendant to accommodate the religious practices of an employee is required before that defendant can be allowed to raise the further defense of undue hardship.

McDaniel v. *Essex*, 509 F. Supp. 1055, 1058 (W.D.Mich.1981).

An employer that refuses to make any effort to accommodate the religious practices of an employee must not be permitted to plead as a part of its undue hardship defense: "there was nothing we could do." In the instant case, the school board passively permitted Philbrook to take religious leave days without pay for several years. When, unable to take leave without pay any longer, Philbrook sought an accommodation, the school board did absolutely nothing. Its passive acceptance of Philbrook's prior unpaid absences did not constitute an affirmative effort at accommodation. The relevant time period began when Philbrook first sought an accommodation. From the time

Philbrook began to suggest to the school authorities various ways to accommodate his religious needs, the Board consistently rejected or ignored his proposals. *Philbrook* v. *Ansonia School Board*, 757 F.2d 476, 480 (2d Cir. 1985). To permit the board to raise the undue hardship defense would encourage discrimination in blatant disregard for the spirit and letter of the law.

In *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977), the Supreme Court stated that § 701(j) was added to change the result of *Riley* v. *Bendix*, 330 F.Supp. 583 (M.D.Fla.1971), in which "the employer had not made any effort whatsoever to accommodate the employee's religious needs." *Hardison*, 432 U.S. at 75 n.9. Thus, Title VII requires the employer to affirmatively accommodate the religious practices of its employees. When the employer fails to take action to attempt an accommodation, it is guilty of discrimination and is without a defense.

If the purpose of Title VII in eliminating religious discrimination in employment is to be realized, it is essential that employers be required to actively accommodate an employee's religious needs before being permitted to raise the defense of undue hardship. Otherwise, an employer will assert, after the fact, that anything it might have done would have been unduly burdensome without ever having made an attempt at accommodation. Such a construction encourages employers not to make any effort to accommodate, and to excuse such inaction by the mere assertion of an "undue hardship." If acceptable, this attitude would defeat the whole purpose of Title VII. Under this law, employers must be required to actively pursue religious accommodation, or else forfeit the right to raise the defense of undue hardship.

II. THE FREE EXERCISE CLAUSE REQUIRES THE STATE, AS EMPLOYER, TO ACCOMMODATE THE RELIGIOUS PRACTICES OF ITS EMPLOYEES, APART FROM THE REQUIREMENTS OF TITLE VII.

By application of the Free Exercise Clause of the First Amendment to the states through the Fourteenth Amendment, the state has a duty to protect the rights of its employees to freely practice their religion. This duty arises wholly apart from any statutory requirement contained in Title VII of the Civil Rights Act of 1964. Even though an employee has no "right" to employment in the public sector, the state must not condition that employment on the giving up of fundamental rights. *Speiser* v. *Randall*, 357 U.S. 513 (1958). It is not simply employment that the state may not deny the employee. Government "may not deny a *benefit*, to a person on a basis that infringes his constitutionally protected interests." *Id.*, at 526 (emphasis added). Such a denial of benefits is offensive because it puts coercive pressure upon the employee. *Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960). The Supreme Court has recently declared:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby *putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement may be substantial.*

Thomas v. *Review Board*, 450 U.S. 707, 717-718 (1981) (emphasis added).

Under Title VII the private employer is under no constitutional obligation to accommodate, as the duty is purely statutory. The fact that the statute enacted under Congressional commerce power upholds the spirit of the Constitution to protect fundamental rights is irrelevant,

for the Constitution creates no right to be free from discrimination in private employment. This does not minimize the importance of non-discrimination in employment. It simply helps explain why the interests of the employer in maintaining the integrity of business functions must be given significant weight in the balancing against religious interests under Title VII. Thus, in *Thornton* v. *Caldor*, 105 S.Ct. 2914 (1985), the Supreme Court invalidated a Connecticut law that entitled employees to take off on their sabbaths, regardless of any hardship that might be caused to the business or to other employees. *Id.* at 2917.

The state as employer, however, falls into a different category. Although the state has a significant interest in maintaining the integrity of its public enterprises, "[u]nder the Religion Clauses, Government must guard against activity that impinges on religious freedom." *Caldor*, 105 S.Ct. at 2917. Just as state action denying unemployment benefits to employees fired because of conflicts arising out of their religious practices and beliefs constitutes a denial of Free Exercise rights, *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Thomas*, 450 U.S. 717; so too does state refusal to accommodate the religious beliefs of its employees place an unacceptable burden on the Free Exercise of religion. Thus, the state has a duty to reasonably accommodate the religious beliefs of its employees independent of the requirements of Title VII.

The contract between Ansonia School Board and the union constitutes state action that has coerced Philbrook into comprising his religious integrity. Philbrook violated his conscience because the receipt of salary was conditioned on his working on some of his religious holidays. The fact that the contract was neutral on its face is not controlling. The Court has frequently found facially neutral statutes to infringe upon individual liberties. *West Virginia State Board of Education* v. *Barnette*, 319 U.S.

624 (1943); *Sherbert*, 374 U.S. 398 (1963); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Thomas*, 450 U.S. 717 (1981). Such violation cannot be treated lightly. Harlan Fiske Stone, later Chief Justice declared that:

> [A]ll our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep is its significance and vital indeed is it to the integrity of men's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation . . . Stone, *The Conscientious Objector*, 21 Col U.Q. 253, 269 (1919),

quoted in, *United States* v. *Seeger*, 380 U.S. 163, 856 (1965).

The violation of fundamental liberties is of special concern when it occurs in the context of our schools.

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation.

Shelton v. *Tucker*, 364 U.S. 487 (1960).

If it is undesirable to hinder the free expression of teachers because of their special relationship to the education of America's youth, it should be similarly offensive to hinder their religious freedom. Denial of teachers' religious freedom presents students with a direct and personal example of national hypocrisy. If students are to learn the value of freedom, that value must be both taught

and practiced in the classroom. To coerce Philbrook into teaching his classes on those days when his conscience demands that he engage in worship undermines the dissemination of the liberty of conscience Americans so cherish. Religious freedom must always receive "vigilant protection", *Id.*, but especially in public schools.

In cases involving free speech, the Supreme Court has applied a balancing test to resolve the conflicting interests of the public employer and the employee. *Connick* v. *Myers*, 461 U.S. 138, 143 (1983); *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering, 391 U.S. at 568.

Similarly, under the Free Exercise Clause, a balance should be struck between the religious needs of the teacher and the integrity of the school's functioning. Since Philbrook was permitted to take time off for religious leave in any event, his absence cannot constitute a burden on the school. The sole issue is whether paid leave would unduly hamper the school board in the administration of education. Unlike *Hardison*, 432 U.S. 63, where a valid union seniority system prevented the airline from reasonably accommodating a maintenance mechanic, the rights or interests of other employees are not affected by requiring the school board to pay for Philbrook's religious leave. Even though an exception to an otherwise valid and neutral union contract provision is required, this case is readily distinguishable from cases, such as *Hardison*, 432 U.S. 63, where a hardship would be forced upon other employees. Furthermore, since other employees are not

required to pay the salaries of their substitutes when taking valid personal leave, neither should Philbrook be required to pay for his substitute. This would discriminate against Philbrook on the basis of his religion, as well as deny him the equal protection of the law under the Fourteenth Amendment.

When Philbrook's constitutionally protected religious interest is weighed against the insignificant cost to the school of accommodating him, the Board's constitutional duty to accommodate Philbrook's religious exercise becomes clear. The Board's refusal to accommodate coerced Philbrook into compromising his religious beliefs by working on his holidays. Such coercion is impermissible, and must be removed. Since other employees are entitled to paid leave time for legitimate personal reasons, Philbrook should also be entitled to paid leave for his legitimate religious reasons.

III. THE *DE MINIMUS* LANGUAGE ADOPTED IN *HARDISON* HAS UNINTENTIONALLY UNDERMINED THE RELIGIOUS ACCOMMODATION PROVISION OF TITLE VII. SINCE THE ESTABLISHMENT CLAUSE PERMITS RELIGIOUS ACCOMMODATION AND IS NOT OFFENDED BY TITLE VII, THE COURT SHOULD CLARIFY AND REAFFIRM THE CONSTITUTIONAL VALIDITY OF THE REASONABLE ACCOMMODATION STANDARD.

The Establishment Clause does not prevent Congress from requiring accommodation of an employee's religious practices. One issue in this case is whether it is constitutionally permissible to prevent an employer from firing someone because he is Catholic, for example, but impermissible to insist that the employer take reasonable steps to retain a Sabbath-keeping Orthodox Jew. If so, then constitutional protection against religious discrimination in employment protects only those whose religion does

not conflict with employment conditions, namely, the majority. If the employer is under no affirmative duty to accommodate, members of religious minorities become subject to blatant discrimination.

In *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977), the Supreme Court did not focus on the scope of the "reasonable accommodation" standard enacted by Congress in § 701(j) of Title VII of the Civil Rights Act of 1964. Instead, the Court used another basis for analysis: the *de minimus* standard. Regrettably, this action has had the unintended effect of weakening the "reasonable accommodation" standard. As a consequence, a body of law has developed which has either ignored the Court's *de minimus* rationale, *e.g.*, *McDaniel* v. *Essex International, Inc.*, 696 F.2d 34 (6th Cir. 1982); *Nottleson* v. *Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445 (7th Cir. 1981); *See also*, Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since* Trans World Airlines v. Hardison, 53 Fordham L.R. 839, 847 (1985) (hereinafter cited as *Fordham Note*) ("several courts have in fact given only superficial obeisance to the Supreme Court's 'more than de minimus cost' hardship doctrine, while actually creating more demanding standards for defendants."); or has interpreted the *de minimus* language to mean that employers cannot be required to accommodate the religious practices of their employees. *e.g. Turpen* v. *Missouri-Kansas-Texas Railroad*, 736 F.2d 1022 (5th Cir. 1984); *Yott* v. *North American Rockwell corp.*, 602 F.2d 904 (9th Cir. 1979); *Rohr* v. *Western Electric Co.*, 567 F.2d 829 (8th Cir. 1979); *See also*, *Fordham Note*, at 855 n.128 ("By making the standard of 'undue hardship' extremely easy to meet, a court in effect negates the duty to accommodate"). Thus, in *Turpen*, 736 F.2d 1022, a railroad employer was found to be unduly burdened by an hour and a half attempt to adjust an employee's work schedule.

Similarly, in *Rohr*, 567 F.2d 829, the court held that any accommodation alternatives were unduly burdensome to a large corporation. As an apparent consequence of *Hardison*, Title VII's goal of eliminating religious discrimination in employment has been seriously impeded.

Certainly, the Court never intended to substitute its *de minimus* language for the "reasonable accommodation" standard enacted by Congress. *Hardison* has created unintended confusion, therefore, allowing some to argue that § 701(j) is an unconstitutional establishment of religion. The Church contends that § 701(j) is a permissible accommodation under both religion clauses, and respectfully petitions this Court to so hold, thus affirming the great principle of religious liberty, while clarifying the conflicting results which have flowed from *Hardison*.

A. Both Religion Clauses, Promote Religious Freedom And Permit Religious Accommodation

Although the Court has occasionally suggested that the two religion clauses are in conflict, *E.g.*, *Walz* v. *Tax Commission*, 397 U.S. 664, 668-669, (1970), it has repeatedly recognized the existence of "a general harmony of purpose between the two religion clauses of the First Amendment." *Gillette* v. *United States*, 401 U.S. 437, 461 (1971). "The ultimate First Amendment objective," Justice Goldberg declared, is "religious liberty." *Abington School District* v. *Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J. concurring) "The Framers did not entrust the liberty of religious beliefs to either clause alone." *Schempp*, 374 U.S. at 256 (Brennan, J. concurring). Thus, the Establishment Clause is a "coguarantor, with the Free Exercise Clause, of religious liberty." *Id.* More recently, the Court declared that "under the Religion Clauses, Government must guard against activity that impinges on religious freedom." *Thornton* v. *Caldor*, 105 S.Ct. 2914, 2917 (1985). Thus, "although a distinct jurisprudence has enveloped each of these clauses, *their common purpose is to secure religious liberty.* See *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962)" *cited in*, *Wallace* v. *Jaffree*, 104 S.Ct. 2479, 2496 (1985) (O'Connor, J. concurring). (emphasis added).

Statutory accommodations of religious practices are in the best tradition of the First Amendment and are just as consistent with the Establishment Clause as they are with Free Exercise. Writing in *Schempp*, Justice Brennan perceptively noted:

> Nothing in the Constitution compels the organs of government to be blind to what everyone else perceives—that religious differences among Americans have important and pervasive implications for our society. Likewise *nothing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs*. Surely the Framers would never have understood that such a construction sanctions that involvement which violates the Establishment Clause. Such a conclusion can be reached, I would suggest, only by using the words of the First Amendment to defeat its very purpose.

74 U.S. 203 at 295. (emphasis added).

Similarly, in *Gillette*, Justice Marshall stated:

> Quite apart from the question whether the Free Exercise Clause might require some sort of exemption, *it is hardly impermissible for Congress to attempt to accommodate free exercise values*, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience." *United States* v. *Macintoch*, 283 U.S. at 634 (Hughes, C.J., dissenting).

401 U.S. at 453 (emphasis added).

Because the two religion clauses are essentially in harmony they should not readily be interpreted to conflict. The Court should consider the underlying purpose of both clauses which is to protect and promote religious liberty, as it has consistently done. The court has consistently recognized the constitutional validity of exemptions or accommodations for conscientious objection, *Welsh* v. *United States*, 398 U.S. 333 (1970); *Selective Draft Law Cases*, 245 U.S. 366 (1918); for the Amish, *United States* v. *Lee*, 455 U.S. 252 (1982) (approving exemption from social security tax for self-employed but not for employees); for American Indians, *Bowen* v. *Roy*, 54 U.S.L.W. 4603 (1986) (approving statutory protection for American Indian religious freedom); and for tax exemption for churches, *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), It has judicially created similar exemptions as well, *e.g. Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (exempting Amish children from compulsory attendance at high school); *Thomas* v. *Review Board*, 450 U.S. 707 (1981) (exempting employees discharged for religious reasons from disqualification from unemployment benefits). It is too late in the day to doubt that such exemptions are permissible expressions of the constitutional commitment to religious freedom expressed in both religion clauses of the First Amendment. If § 701(j) is to be singled out for invalidation by the Establishment Clause, it must be shown to be significantly more offensive than the exemptions and accommodations illustrated here.

B. The Religious Accommodation Provision Of Title VII Has A Secular Purpose And Effect To Prevent Religious Discrimination In Employment.

Those courts and commentators that would hold § 701(j) to be an unconstitutional establishment of religion rely primarily on two points: its supposed religious purpose expressed by Senator Randolph, the bill's sponsor; and the statute's alleged discriminatory effect.

1. § 701(j) Has A Secular Purpose

The remarks of Senator Randolph are supposed to betray the religious purpose of § 701(j), thereby violating the first prong of the three part *Lemon* test (requiring all legislation to have a secular purpose, a secular effect, and to not cause excessive entanglement between church and state), 403 U.S. 602 (1971). Ever since *McGowan* v. *Maryland*, 366 U.S. 420 (1961), the Court has held that legislation must have a secular purpose if it is to pass muster under the Establishment Clause. The secular purpose standard, described in *Lynch* v. *Donnelly*, 104 S.Ct. 1355 (1984), allows for some religious purpose as well:

> The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, *but only when* it has concluded there was no question that *the statute* or *activity was motivated wholly by religious considerations. See e.g.*, *Stone* v. *Graham*, . . . 449 U.S., at 41 . . . *Epperson* v. *Arkansas*, 393 U.S. 97, 107-109 . . . (1968); *Abington School District* v. *Schempp*, . . . 374 U.S. at 223-224 . . .; *Engel* v. *Vitale*, 370 U.S. 421, 424-425 . . . (1962). Even where the benefits to religion were substantial, as in *Everson*, . . . *Board of Education* v. *Allen*, 392 U.S. 236 . . . (1968), *Walz*, . . . and *Tilton*, . . . we saw a secular purpose and no conflict with the Establishment Clause.

Id. at 1362 (emphasis added).

In upholding the secular purpose of § 701(j) against an Establishment Clause challenge, the Sixth Circuit exclaimed: "Surely this is a far cry from cases such as *Epperson* v. *Arkansas*, 393 U.S. 97 (1968), in which the Supreme Court struck down an Arkansas statute prohibiting public schools and universities from teaching the Darwinian theory of evolution." *Cummins* v. *Parker Seal Co.*, 516 F.2d 544, 552 (6th Cir. 1975). Mandating accommodation of the religious practices of employees in the workplace does not constitute a religious purpose as

would such public school practices as Bible reading, *Engel*, 370 U.S. 421; or recitation of the Lord's Prayer. *Schempp*, 374 U.S. 203. Nor is it a direct support for religion such as state funding of parochial education in *Tilton* v. *Richardson*, 403 U.S. 672 (1971); and *Board of Education* v. *Allen*, 392 U.S. 236 (1968); the approval of legislative chaplains in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), or state financing of theological education in *Witters* v. *Washington Department of Services for the Blind*, 106 S.Ct. 748 (1986).

The real problem with relying on Senator Randolph's remarks is that the Court must then impute to Congress as a whole the religious motivation thought to dominate the sponsoring Senator. "The argument of one Senator that the proposed legislation would assist a particular pastor and religious group does not require the conclusion that Congress enacted the legislation to promote and support a particular religion." *Cummins*, 516 F.2d at 553. Other remarks of Senator Randolph suggest a legitimate secular motive. The Ninth Circuit looked to Senator Randolph's statement that "the legislation was intended to 'assure that freedom from religious discrimination in the employment of workers is for all time guaranteed in law.' 118 Cong. Rec. 705." *Tooley* v. *Martin-Marietta Corp.*, 648 F.2d 1239 (1981). It would hardly be consistent with a First Amendment that secures religious freedom to prohibit a Senator from discussing the negative impact of religious discrimination on church membership and attendance when he wishes to convey the need to alleviate such discrimination. Common sense declares that the Senate passed § 701(j) not because of any purpose to promote either Senator Randolph's religion, or minority religions in general, but because it found the Amendment to serve a significant national purpose in alleviating religious discrimination.

As noted in *Wallace* v. *Jaffree*, 105 S.Ct. 2479 (1985), the religious purpose of a bill's sponsor should not automatically invalidate the bill itself. In *Jaffree*, the Court considered an Alabama statute requiring a moment of silence for "meditation or voluntary prayer" at the beginning of each school day. A previous statute had already provided for a moment of silence. The Court found that "the statute had *no* secular purpose." *Id.* at 2490 (emphasis in original). Furthermore, "the religious character" of the bill was "plainly evident from its text." *Id.*, at 2491. As Justice Powell observed in concurrence, "the State also . . . failed to identify any non-religious reason for the statute's enactment." *Id.* at 2495. Thus, it was under very narrow and persuasive circumstances that the Court attributed to the Alabama legislature the religious motives of the bill's sponsor. None of those conditions are present in the adoption of § 701(j). Section 701(j) has a very definite secular purpose: to afford members of minority religions equal employment opportunities. Nor is § 701(j) "wholly religious in character." Finally, and conclusively, this Court has already acknowledged that "the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment," *Hardison*, 432 U.S. at 85, a worthy secular purpose.

2. § 701(j) Has A Non-Discriminatory Secular Effect.

§ 701(j) of Title VII has also been criticized for requiring "that persons receive preferential treatment because of their religion," thus mandating "religious discrimination." *Cummins*, 516 F.2d at 556 (Celebrezze, J. dissenting). The provision is therefore said to lack the requisite neutrality. *Id.* Because such reasoning ignores the common purpose of the religion clauses to protect religious freedom, and because such myopic constitutional analysis is all too prevalent, it is incumbent upon this Court to reinforce the doctrine of religious neutrality that protects the practices of religious minorities.

The type of strict neutrality analysis that would invalidate § 701(j) as an unconstitutional establishment of

religion has been frequently rejected by this Court. As Professor Tribe explained in his text:

> The Court has never adopted the so-called "strict neutrality theory," which would hold that "government cannot utilize religion as a standard for action or inaction because [the two religion clauses] prohibit classification in terms of religion either to confer a benefit or impose a burden." (citation ommitted).

Tribe, *American Constitutional Law*, 820-821 (1978).

This strict neutrality requirement that Government keep hands off religion would invalidate all government action that singles out religion. If the Court followed such logic, it would have to overturn such judicially approved accommodations of religion as legislative chaplains, *Marsh* v. *Chambers*, 463 U.S. 783 (1983); exemption from military service for those with religious objections, *Welsh* v. *United States*, 398 U.S. 333 (1970); military chaplains, *Abington School District* v. *Schempp*, 374 U.S. 203 (1963) (Brennan, J. concurring); released time from public schools for religious education, *Zorach* v. *Clauson*, 343 U.S. 306 (1952); and tax exemption of churches, *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); as well as other judicially created exemptions; *E.g.*, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

The fatal flaw in the logic of "strict neutrality" is that the Free Exercise Clause is not simply a repeat of the Equal Protection language of the Fourteenth Amendment. The Free Exercise Clause singles out religious belief and practice for special, affirmative treatment by government. Justice Douglas, writing in *Zorach* v. *Clauson*, 343 U.S. 306, rejected an Establishment Clause challenge to a program of released time from public school for religious education, a practice far more favorable to religion than Title VII. He declared:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.* That would be preferring those who believe in no religion over those who do believe.

343 U.S. at 313, 314. (emphasis added).

Justice Goldberg, concurring in *Schempp*, defined the doctrine of "neutrality" under the First Amendment as being a means of achieving religious liberty, rather than as an end in itself:

> [U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active hostility to the religious. Such results are not only not compelled by the Constitution, but it seems to me, are prohibited by it. . . . *Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.* And it seems clear to me from the opinions in the present and past cases that the Court would recognize the propriety of providing military chaplains and of the teaching about religion, as distinguished from the teaching of religion, in the

> public schools. The examples could readily be multiplied, for both the *required and the permissible accommodations* between state and church frame the relation as one free of hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other. To be sure, the judgment in each case is a delicate one, but it must be made if we are to do loyal service as judges to the *ultimate First Amendment objective of religious liberty.*

374 U.S. at 306 (emphasis added).

When government singles out religious practice for accommodation it is acting in harmony with the First Amendment. Neither the principles of non-establishment or neutrality are offended by such accommodations. Thus, in *Walz*, 397 U.S. 664 (1970), singling out churches for tax exemption was found to be consistent with the "benevolent neutrality" required of the religion clauses. *Id.* at 669. This principle was reaffirmed most recently in the case of *Bowen* v. *Roy*, 54 U.S.L.W. 4603 (1986). After citing the Congressional Joint Resolution concerning American Indian religious freedom, the Court said: "that Resolution—with its emphasis on protecting the freedom to believe, express, and exercise a religion—*accurately identifies the mission of the Free Exercise Clause itself.*" *Id.*, at 4605-4606 (emphasis added). Clearly, statutes designed to protect the free exercise of religion do not inherently offend the secular purpose requirement of the Establishment Clause.

Although special treatment clearly can be required for religious practice, an issue in this case is whether § 701(j) discriminates against those employees not directly benefitted thereby. There are two classes of employees who may allege such discrimination: members of other religions and members of no religion.

There is no discrimination against members of other religions, because the school schedule already accommodates their religious practices. By scheduling vacations to coincide with Christmas and Easter, the vast majority of employees' religious needs are met. *C.f.*, *Sherbert* v. *Verner*, 374 U.S. 398 (the statute had a special provision for those observing Sunday as a day of rest). Here, in effect, the schedule itself discriminates against all religious persons whose holidays don't fall at the same time as the majority. The purpose of § 701(j) is to restore equality by accommodating the beliefs and practices of religious minorities where they conflict with society in general, and with the employer in particular.

The secular person may complain that he does not receive time off for religious holidays. However, this would be true whether or not Philbrook was accommodated. The status of the secular person is not affected in the slightest by the board accommodating Philbrook's religious practice. If the secular person insists that he ought to be able to take the same time off to go fishing as Philbrook takes to observe his religion, the reply is straightforward. The terms of the bargaining agreement already permit all employees to take off for *legitimate* personal reasons. Religion is recognized as one of those legitimate reasons; fishing is not. It is the validity of the leave that is significant, not its personal nature. Comparison of religious leave with purely recreational purposes is inappropriate. Since the leave provisions already grant other employees as many or more paid personal leave days to meet their secular needs, *Philbrook* v. *Ansonia Board of Education*, 757 F.2d 476, 485 (2d Cir. 1985), it is Philbrook who is being discriminated against. He does not receive the same number of paid leave days to meet his valid religious needs as others do to meet their secular needs.

This case does not present the issue of whether an employee ought to be permitted paid religious leave where there is no provision for paid personal leave. Nor is

there an issue whether an accommodation would offend Establishment Clause neutrality if Philbrook demanded to be paid for work not done. In that case, it is arguable that Philbrook would be treated not merely equally, but more than equally. Even so, to the extent that other employees are entitled to leave pay for personal reasons, it would violate equal protection not to extend similar benefits to Philbrook. In this case, however, Philbrook offered to make up the time he was absent, thereby being paid only for work actually performed.

As applied to the facts of this case, it is clear that Title VII does not discriminate in favor of Philbrook. To require the school board to adopt Philbrook's proposed accommodation by paying for his religious leave days, and allowing him to make up the hours, would restore Philbrook's employment conditions to parity with other employees. The effect of Title VII in this case is to enforce the legitimate secular goal of securing equal employment opportunities for religious persons. Therefore, the "secular effect" requirement of the *Lemon* test is fully satisfied.

C. The Establishment Clause Is In Harmony With The Protection Of Religious Liberty Afforded By The Free Exercise Clause.

In order to appreciate that Title VII is consistent with the Establishment Clause, the underlying purpose of the Clause must be considered. It has already been demonstrated that the fundamental goal of both religion clauses is to promote and protect religious liberty. Thus, both clauses should "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary and sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach* v. *Clauson*, 343 U.S. at 313 (Douglas, J. concurring). The flexibility of the Establishment Clause

to protect rather than inhibit religion is apparent in Justice Rehnquist's statement that: "one fixed principle in this field is our consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause." *Mueller* v. *Allen*, 463 U.S. 388, 389 (1983) (citations ommitted).

A notable formulation of the purpose of the Establishment Clause was stated by Justice Brennan in *Abington* v. *Schempp:*

> "What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religion with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice . . .
>
> When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers—*as much to church as to state*—which the Framers feared would subvert religious liberty and the strength of a system of secular government.

374 U.S. at 231 (emphasis added).

The religious accommodation provision of Title VII satisfies Justice Brennan's three-part formulation of Establishment Clause purposes. First, § 701(j) does not serve the essentially religious activities of religious institutions. Title VII deals with individuals, while the concern of the Establishment Clause is most frequently with aid to religious institutions. Second, the organs of government are employed not to serve religious interests, but to promote equality among individuals in employment oppor-

tunity. Thirdly, this section utilizes secular and not religious means to accomplish its goal.

Another formulation of Establishment Clause purposes provides: "the establishment clause . . . primarily proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Nyquist*, 413 U.S. at 772, *quoted in Grand Rapids* v. *Ball*, 105 S.Ct. 3216, 3222 (1985). Sponsorship, as distinct from financial support, must entail the kind of forbidden government endorsement of religion discussed by Justice O'Connor in her concurrence in *Lynch* v. *Donnelly*, 104 S.Ct. 1355 (1984). It is difficult to take seriously the notion that Congress intended to endorse or sponsor minority religions in general, or Senator Randolph's religion in particular, by enacting the religious accommodation provision of Title VII. As for financial support, Title VII requires no money to be paid by any state or local government. Neither does Title VII require the state to become actively involved in the internal affairs of any religious organization. Mandating religious accommodation in employment differs greatly from the kinds of government involvements with religious activity that the Court has previously struck down as posting the Ten Commandments, reciting the Lord's Prayer and reading the Bible in public school classrooms, *Stone* 449 U.S. 39; *Schempp*, 374 U.S. 204.

Title VII's religious accommodation provision does not offend, but is wholly consistent with Establishment Clause purposes. Indeed, Title VII reflects the sensitivity of the political majority to the religious problems of minorities. It would be ironic to insist that such a statute designed to promote religious freedom offends the First Amendment. The standard of "reasonable accommodation" allows for a fair balancing of interests. Since the *de minimus* language of *Hardison* has been misunderstood as establishing a new standard, it is imperative

that the Court reaffirm the constitutional validity of the "reasonable accommodation" language of § 701(j).

CONCLUSION

Accordingly, *Amicus Curiae* urges this Court to affirm the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

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